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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 776

THE NATIONAL COMMITTEE OF GIBRAN,
also known as THE COMITE NATIONAL DE GIBRAN,
representing THE TOWN OF BECHARRE, LEBANON,
Petitioner,

v.

GEORGE G. SHIYA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondent's brief in opposition concentrates upon the choice of law question and not upon the other grounds advanced in the petition respecting the substantive principles that should control attorney-client fee litigation. Thus, for example, respondent does not even mention petitioner's contention (Pet. p. 32) that the decision in the case at bar is in conflict with *Maddox v. Fidelity Investment & Title Co.*, 300 F.2d 1, 3 (4th Cir. 1962). Accordingly, there is no occasion for us to reply to anything other than respondent's discussion of the choice of law problem.

Respondent does not deny that the issue of choice of law in federal court attorney-client fee litigation is important, nor

that the lower courts' election of federal law conflicts with the election by other federal courts of local law. Respondent maintains that, nonetheless, certiorari should not be granted because for two reasons this case is not an appropriate vehicle for considering the question presented; (1) the choice of law question was not raised by petitioner in the lower courts, and (2) resolution of the issue one way or the other would have no impact in this case because federal law is identical to local law on the only substantive issues here involved. In this reply, we show that the fact that the choice of law question was not raised in the lower courts should not preclude review and that there are important differences between the law of New York and the law applied by the lower courts in this case.

As we stated in the petition and as the statistical case citation index provided by respondent suggests (note p. 4), petitioner did rely upon New York law in the lower courts. It is also true, however, that neither party explicitly raised the question as to whether New York law or federal law should control. Rather, respondent attempted to distinguish the New York decisions cited by petitioner in much the same fashion as he does in this Court, and both parties cited a scattering of cases from other jurisdictions as being in conformity with their respective interpretations of New York law.

But the question is not really whether, or why, neither party dealt with the choice of laws question in the lower courts, but what relevance that fact has to the petition for certiorari – a problem respondent does not touch except by the mistaken reliance upon cases like *Ellis v. Dixon*, 349 U.S. 458, which arose in state courts and which accordingly posed the adequate state ground question.

In some circumstances, of course, the fact that an issue was not presented to the court may result in waiver. But that result should not obtain in this case for two reasons. First, choice of laws, like jurisdiction, is an issue that is necessarily met by the trial and appellate courts in this type

of case. That is, in resolving the substantive issues presented, the lower courts could not possibly avoid determining the appropriate body of law against which the substantive contentions were to be measured. And, second, the District Court explicitly ruled that federal laws applied and, for the reasons advanced in our petition (pp. 17, 24-25), there is every reason to believe that this view was shared by the Court of Appeals.[1] And where a court passes upon an issue, the fact that it was not raised is, of course, wholly immaterial.

Thus, although the choice of law question was not raised by petitioner, the lower courts opted for federal law, and if that is so then there is an undeniable conflict with *Carter v. Spanos*, 250 F.2d 814, 816 (8th Cir. 1958), and *Gray v. Joseph J. Brunetti Construction Co.*, 266 F.2d 809 (3d Cir. 1959). Respondent does not even mention *Carter*, and its discussion of *Gray*—that the court "could just as well have cited New York cases [as New Jersey cases]" (p. 12) – wholly misses the point with respect to the choice of law question.

We add that, even without a conflict, the question of choice of law is quite difficult and important enough to deserve resolution by this Court. Viewed from this perspective rather than in the context of a conflict of decisions, the ambiguity of the Court of Appeals' decision is even less relevant. Moreover, as we have indicated (Pet. p. 25), this Court has granted certiorari in the absence of a conflict in circumstances very much like those presented here – where the "opinion of [the Court of Appeals] does not make clear whether affirmance was based upon agreement with the trial judge that New York law was applicable, or

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[1] In this connection, it may be noted that such a view would accord with the Court of Appeals' choice of federal, as against New York, law in the case cited by respondent, *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, cert. den., 385 U.S. 986. That decision also indicates that, as respondent himself suggests (p. 11), it is most unlikely that the Court of Appeals inadvertently overlooked the choice of law problem in the case at bar.

upon a determination that the controlling legal principles would in any event be no different under maritime law." *Kermarec v. Compagnie Generale*, 358 U.S. 625, 628.

One final word on this branch of respondent's argument seems appropriate. Respondent seems to suggest that, although the District Judge clearly held that federal law governed, that determination should not be taken seriously because the Judge was of the view that federal and state law were identical. And respondent charges us with an "obvious attempt" to "create an unfounded issue" by "truncating" the District Court's statement. We demonstrate below that New York law is decidedly different than the law of many other jurisdictions, so that it is unlikely that the Judge would have thought the contrary. But the point we make is that, whetever the Judge might have thought, respondent is surely in error in construing what he said. The passage in question,[2] as we observed in our petition (p. 17 n. 13), is plainly limited to an issue that was raised in the District Court but that is not relevant here, namely, whether the Court had jurisdiction in ancillary proceedings to consider respondent's claim, not only for fees arising out of the copyright litigation, but for fees unrelated to that litigation. As to this, it is quite true that the Court would have no jurisdiction under New York law or any other law of which we are aware. Accordingly, respondent's effort to draw some sort of concession from the "Thank you, Your Honor" of petitioner's counsel would fail even if that remark had been in response to the Judge's statement respecting its jurisdiction, as respondent says it was (Br. in Opp., p. 3). But in fact, the remark was in response to the Judge's "All right. Now we will hear from you Counselor Sams. Take your time" (R. 1582).

[2] "However, I think the Federal Law on this is substantially as set forth in the New York State Judiciary Law and that the jurisdiction of this Court is for the fixation of fees earned in the particular litigation filed in this Court and does not extend to other matters and does not extend to the enforcement of a general attorney's lien" (R. 1582, App. 116b).

2. Respondent's second principal contention is that choice of law in this case could make no difference because the federal law applied by the lower courts was identical to New York law, which in turn is identical to the law applied in all other jurisdictions. Respondent is demonstrably incorrect.

a. There are two aspects to the problem of the supervisory authority of a court over the amount of contingent fee contract: (1) whether the court will limit the fee to a standard of "reasonableness" in the absence of palpable fraud and over-reaching; (2) whether the court will test the fee by factors other than the proportion of the fee to the recovery. In both respects, the decisions of the lower courts depart from the law of New York, although at least as to the former they are in accord with the law of many other jurisdictions. While we have already discussed this aspect of the case (Pet. pp. 20-22, 32-33), respondent's counter arguments deserve response.

Respondent obviously recognizes that the lower courts did not accept petitioner's contention that, questions of fraud and overreaching apart, the amount of the fee was subject to the test of reasonableness under the rule of *Gair v. Peck*, 6 N.Y. 297, 160 N.E.2d 43 (1959). Respondent points out (pp. 8-9) that in another decision, *Matter of Kuflik*, 342 F.2d 421 (1965), the Court of Appeals applied the test of "overreaching and. . . fraud"; and respondent maintains (p. 7) that this conforms with *Gair*, for that case "was not meant to and did not have any effect on. . . New York law as expressed in *Matter of Mason*, 174 Misc. 218 . . . where the court said . . . 'Since both of the parties were competent adults, it was open to them to fix this remuneration in advance, and in the absence of inequitable dealings in the inception of the contract, a court . . . would presumably enforce it according to its terms. . . since, as a general principle, the courts will not concern themselves with the terms of a contract if fairly attained."

But while the lower courts, having resolved questions of respondent's breach of duty against petitioner and having stopped there, plainly applied the "competent adult" test, just as plainly that is not the test of *Gair*. There is room for debate, as the majority and minority opinions in *Gair* demonstrate, about the status of the prior New York decisional law. See Note 60, Colum. L. Rev. 242, 246. Indeed, as the minority opinion in *Gair* points out, the Association of the Bar of the City of New York evidently had despaired of persuading the courts to supervise contingent fee contracts except in cases of fraud and overreaching.[3] But there is no room for debate that *Gair* represented a notable liberalization of the fraud and overreaching standard, not simply a new formula for expressing the same standard. If words are to be accorded their ordinary meaning, surely a test of "reasonableness" means something different than a "fraud and overreaching" criterion or a "competent adult" test or the various similar standards applied in a number of other jurisdictions.[4] That the adoption by the New York court of this standard was a marked ad-

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[3] In 1938, a committee of the Association commented: "There is little practical scope left for the argument that the courts retain any power in this field apart from fraud and overreaching. . . .[T]he lines of judicial and legislative doctrine are too firm by this time to sustain the hope of successful modification by the judiciary alone. . . ." Annual Reports of Association of Bar of City of New York, pp. 295-296 (1938). See also a similar statement by the Association five years later. *Association of Bar of City of New York, Reports*, V, 80, No. 649 (1943).

[4] In addition to the Oklahoma standard cited in the Petition (p. 21 note) – a contract "such as no man in his senses and not under a delusion would make on one hand, and as no honest and fair man would accept, on the other" – see the following accurate description of the general situation: ". . .[A] majority of courts. . . have stated that they will set aside the contract if the fee is so excessive as to evidence a purpose on the attorney's part to obtain an improper and undue advantage over his client. Moreover, some courts may refuse to

vance was recognized by the commentators; and because it was such an advance the decision received considerable attention by them.[5] But it was precisely this inquiry – whether the fee claimed by respondent was reasonable or whether, to use the language of *Gair*, it was "out of all proportion to the value of the professional services rendered" – that the lower courts declined to make, restricting themselves to the fraud and overreaching test then and now advocated by respondent.

Respondent evidently also contends in the alternative that, even if the New York law had been applicable and had required an examination of the reasonableness of the fee, the outcome would have been the same, on the ground that the Court of Appeals observed that in a *quantum meruit* action "an award of 25% of the value of the recovery . . . would not be extravagant" (Br. in Opp. p. 10). We have already pointed out (Pet. pp. 22-23 n. 20, 32) that this narrow view of the evidence relevant to the reasonableness of a fee accords neither with common sense nor with the law prevailing in other jurisdictions, state as well as federal. But it should be noted particularly that *Gair* states specifically that in New York the standard is considerably broader: ". . . [N]o objection would lie against the rule if every lawyer filing a contingent fee retainer agreement were also required to file in his closing statement the amount of time he

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enforce a contingent fee that they consider unreasonable in view of the services rendered by the attorney." Note, 60 Colum. L. Rev. 242, 245. The commentator observed that some New York cases preceding *Gair* seemed to fall into the first category and *Gair* into the second.

[5] Schwarz, *Reflections on Gair v. Peck*, 11 Brooklyn Barrister (Oct. 1959); *Comments*, 2 Ariz. law Rev. 278 (Winter, 1960); 26 Brooklyn Law Rev. 130 (Dec. 1959); 60 Columbia Law Rev. 242 (Fall, 1960); 73 Harvard Law Rev. 1212 (April, 1960); 5 New York Law Forum 419 (Oct. 1959); 21 Ohio State Law J. 695 (Autumn, 1960); 32 St. John's Law Rev. 312 (May, 1958).

devoted to the case and an enumeration of the other facts underlying the elements entering into the value of the lawyer's services (Randall v. Packard, 142 N.Y. 47, 56, 36 N.E. 823, 824)." 160 N.E. 2d at 50. In *Randall*, the case cited in *Gair*, it was held that an instruction in a fee case that would lead the jury to look "entirely or principally" to the result attained by the attorney would be "distinctly erroneous." Thus, even the Court of Appeals' *dictum* is wrong under New York law.

In this connection, one further point deserves clarification. Respondent notes (p. 10) that the District Judge "had before him an extensive affidavit of services prepared by Mr. Shiya containing a recitation of the amount of legal work done in the Gibran litigation," and that this affidavit "was used by the petitioner's trial counsel in cross-examination. . . ." This is literally correct, but it should not be read to mean the district court applied anything like the *Gair* rule. The District Judge refused to allow cross-examination of Mr. Shiya on issues related to a determination of the "reasonable value" of Mr. Shiya's services on the theory the issue would be relevant only in *quantum meruit* proceedings. The affidavit prepared by Mr. Shiya was used by the District Court for the single issue of breach of duty—the "extensive cross-examination," as respondent puts it (p. 9), was directed to that issue. Respondent does not at any point take issue with our contention that, if the appropriate standard is broader than "fraud and overreaching," the lower courts erred. He simply denies that under *Gair* the standard is broader. As to that, he is wrong.

b. Respondent also maintains that the New York law respecting the resolving of ambiguities in fee contracts against attorneys is the same as the law applied by the lower courts. As to this, little need be added to what we have already said. We do not, of course, contend that "under New York law if a retainer is ambiguous then regardless of the circumstances the retainer must always be interpreted in favor of the client" (Br. in Opp. p. 18). What we do con-

tend is that, where the court concedes that *both* the contract and the surrounding circumstances are ambiguous, as the Court of Appeals did here, faithful adherence to the stringent New York decisions (Pet. p. 21 n. 19) requires denial of the claim of the attorney, not that of the client.

As Judge Hays pointed out in dissent, an attorney has a "duty to make clear the terms of his compensation to his client." That view is in accord with the prevailing New York law cited in our petition and with the prevailing view in other states. This principle supplies added force to the general hornbook rule regarding construction of ambiguous contracts against the drafter.

If that concept of the duty of an attorney to make clear the terms of his fee contract does not apply here, and if the rule of construction relevant to ambiguous fee contracts does not apply, there is very little left either of the concept or of the rule.

CONCLUSION

It is certainly true that this is not a case in which review would result in predictable alternative outcomes. It is not, for example, a case in which an indisputably clear state statute would control in one party's favor if it were applicable, but an indisputably clear federal statute would control in the other party's favor if *it* were applicable. If review were granted and if the Court determined that state law should control, it is possible that the Court would remand the case for reconsideration in the light of New York law rather than itself determining the content of that law. But we submit that at the least respondent's view of New York law is so dubious that certiorari should not be denied on the ground that such a remand could make no difference in outcome. Moreover, should this Court determine that the lower courts were correct in applying federal law, then the Court would face the problem of defining the content of that law. Surely the question whether the federal courts should limit their scrutiny of contingent fee contracts to

allegations of fraud and overreaching, and the question whether ambiguities in fee contracts should be resolved against attorneys rather than clients, are questions that warrant the attention of this Court if the federal courts are to fashion their own standards of regulation of attorney-client relations. Attorney-client fee litigation is commonplace in federal courts, and certain features of this case—a state law of expansive regulation of the reasonableness of attorney's fees as opposed to a restrictive federal court decision and an enormous fee charged against a foreign public charitable trust upon the basis of a fee contract and extrinsic circumstances concededly ambiguous—afford an unusual opportunity for testing some of the important opposing contentions. Accordingly, this case is a singularly appropriate vehicle for examination by this Court of the issues raised.

Respectfully submitted,

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